

2-25-2009

Judd v. State Appellant's Reply Brief Dckt. 34408

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COPY

IN THE SUPREME COURT OF THE STATE OF IDAHO

JOHN A. JUDD,

Petitioner-Appellant,

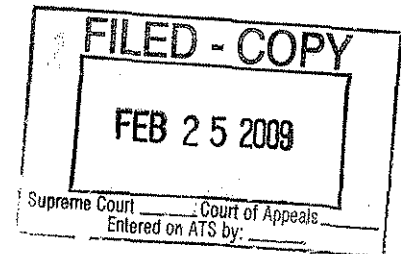
v.

STATE OF IDAHO,

Respondent.

NO. 34408

REPLY BRIEF



REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE SIXTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF BANNOCK

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STATEMENT OF THE CASE

Nature of the Case

John A. Judd appeals from the district court's Order issued July 2, 2008, dismissing his Petition for Post-Conviction Relief. In this Order, the district court dismissed Mr. Judd's post-conviction petition and denied his Motion and Affidavit in Support for Appointment of Counsel at the same time. In his Appellant's Brief, Mr. Judd argued that the district court erred when it failed to rule on his motion to appoint counsel prior to dismissing his petition. (Appellant's Brief, pp.6-9.) In response, the State argues that this was not erroneous, and even if it was, any error was harmless because Mr. Judd's petition was untimely. (Respondent's Brief, pp.4-10.) This Reply Brief is necessary to address the State's argument that any error was harmless. Mr. Judd contends that a harmless error analysis should not be applied in this case and, alternatively, if a harmless error analysis is applied, the error was not harmless because he provided both the possibility of a valid post-conviction claim and the possibility of a valid argument for equitable tolling of the time to file his petition.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Judd's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUE

Did the district court err when it failed to rule on Mr. Judd's motion for appointment of counsel prior to dismissing his post-conviction petition?

ARGUMENT

I.

The District Court Erred When It Failed To Rule On Mr. Judd's Motion For Appointment Of Counsel Prior To Dismissing Mr. Judd's Post-Conviction Petition

A. Introduction

In response to Mr. Judd's argument that the district court erred when it failed to rule on his motion for appointment of counsel prior to summarily dismissing his petition, the State asserts that Mr. Judd's "post-conviction petition was plainly untimely; thus, he failed to raise the possibility of a valid claim, and cannot show any harm in the denial of his motion for appointed counsel." (Respondent's Brief, p.4.) However, this assertion that the error in failing to rule on a motion for counsel can be subject to a harmless error analysis, is contrary to the law set forth by the Idaho Supreme Court in *Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2004) and *Swader v. State*, 143 Idaho 651, 152 P.3d 12 (2007). Furthermore, Mr. Judd contends if a harmless error analysis is employed in this case, the error was not harmless because he provided both the possibility of a valid post-conviction claim and the possibility of a valid argument for equitable tolling of the time to file his petition.

B. The State's Argument That A Harmless Error Analysis Should Be Employed In This Case Is Contrary To *Charboneau* And *Swader*

In response to Mr. Judd's argument on appeal that the district court erred in denying his motion for appointment of counsel at the same time it dismissed his petition, the State argues that, even if this was improper, the appointment of counsel issue should not be remanded to the district court because any error is harmless. (See

Respondent's Brief, pp.8-10.) Rather than remanding the case for the district court to determine whether counsel should be appointed and to provide notice to Mr. Judd if counsel is not appointed, the State would have this Court decide that Mr. Judd cannot have an attorney citing *Swisher v. State*, 129 Idaho 467, 470-71, 926 P.2d 1314, 1317-18 (Ct. App. 1996) for this proposition. (See Respondent's Brief, p.8.)

However, the Idaho Court of Appeal's Opinion in *Swisher* was decided before both of the Idaho Supreme Court's decisions in *Charboneau v. State*, 140 Idaho 789, 102 P.3d 1108 (2004) and *Swader v. State*, 143 Idaho 651, 152 P.3d 12 (2007) and is contradictory to these holdings. *Charboneau* requires that the district court determine whether counsel should be appointed and provide the defendant notice of its reasoning prior to dismissing a petition stating, "[a]t a minimum, the trial court must carefully consider the request for counsel, before reaching a decision on the substantive merits of the petition." 140 Idaho at 793-94, 102 P.3d at 1112-13. In *Swader*, the Supreme Court subsequently clarified *Charboneau*'s standard for appointment of counsel in post-conviction cases, holding that the district court had failed to apply that standard (and had actually applied too onerous a standard) and going on to determine whether, applying the correct standard, counsel should have been appointed. See generally *Swader*, 143 Idaho 651, 152 P.2d 12. Ultimately, the Supreme Court held that counsel should have been appointed and it reversed the order denying the petitioner's motion for appointment of counsel. *Id.* at 655, 152 P.3d at 16. However, in making this determination, the Supreme Court did not reject *Charboneau* and adopt the view that the appellate courts should now be employing a harmless error analysis; rather, the Court simply recognized that there is no value to remanding a case for a determination

of a motion for appointment of counsel where the state of the record is such that the denial of such a motion would amount to an abuse of the district court's discretion. See *Swader*, 143 Idaho at 653-55, 152 P.3d at 14-16.

In addition, even if an appellate court could, and was willing to, decide whether in its own view, counsel should have been appointed under the correct legal standard, the simple fact is that an appellate court is in no position to do so. In *Charboneau*, the Court held that if the appointment of counsel is in doubt, the petitioner must be provided with notice of the reasons why counsel might not be appointed, as well as an opportunity to respond:

It is essential that the petitioner be given adequate notice of the claimed defects so he has an opportunity to respond and to give the trial court an adequate basis for deciding the need for counsel based upon the merits of the claims. If the court decides that the claims in the petition are frivolous, the court should provide sufficient information regarding the basis for its ruling to enable the petitioner to supplement the request with the necessary additional facts, if they exist.

Charboneau, 140 Idaho at 793, 102 P.3d at 1112. Since an appellate court is in no position to provide a petitioner with adequate notice, the Court would have to violate *Charboneau* in order to decide the motion for the first time on appeal. Additionally, applying a harmless error analysis to a procedural bar, timeliness, which has an exception for equitable tolling that was never addressed in the lower court, ignores the rationale behind liberally construing a *pro se* petitioner's post conviction action. Thus, if the petitioner's entitlement to appointment of counsel is in doubt, the proper remedy is for the appellate court to remand the case so that the district court might provide adequate notice and then, when appropriate, exercise its discretion.

Therefore, Mr. Judd submits that this Court may *not* hold that he is not entitled to the appointment of post-conviction counsel. If this Court concludes that Mr. Judd's

petition is sufficient to raise the possibility of a valid claim, this Court should simply order that counsel be appointed to represent Mr. Judd on remand. However, if this Court cannot conclude that Mr. Judd's petition is sufficient to raise the possibility of a valid claim, this Court must remand this case for the district court to rule upon Mr. Judd's motion for appointment of counsel under the appropriate standard articulated in *Charboneau*.

C. Mr. Judd Presented Sufficient Evidence To Raise The Possibility Of A Valid Claim And, Therefore, Even If A Harmless Error Analysis Is Employed, He Is Entitled To The Appointment Of Counsel On Remand

In its Respondent's Brief, the sole basis for the State's argument that any error was harmless is that Mr. Judd's petition was untimely. (Respondent's Brief, pp.8-10) This question of timeliness raises three issues for discussion. First whether Mr. Judd has shown the possibility of a valid claim? Second, if Mr. Judd has shown the possibility of a valid claim, is he also required to show the possibility of a valid argument for equitable tolling? Finally, if Mr. Judd is required to present the possibility of a valid equitable tolling argument, has he done so? Mr. Judd contends if a harmless error analysis is employed in this case, the error was not harmless because Mr. Judd's petition alleged facts showing both the possibility of a valid claim and the possibility of a valid argument for equitable tolling.

1. Mr. Judd Has Shown The Possibility Of A Valid Claim

"[A] needy applicant for post-conviction relief is entitled to court-appointed counsel unless the trial court determines that the post-conviction proceeding is frivolous." *Charboneau v. State*, 140 Idaho at 792, 102 P.3d at 1111. Idaho Code § 19-852(b)(3) sets for the standard for determining whether or not a post-conviction

proceeding is frivolous. It is frivolous if it is “not a proceeding that a reasonable person with adequate means would be willing to bring at his own expense.” I.C. § 19-852(b)(3). When applying that standard to *pro se* applications for appointment of counsel, the trial court should keep in mind that petitions filed by a *pro se* petitioner will often be conclusory and incomplete. Although facts sufficient to state a claim may not be alleged because they do not exist, they also may not be alleged because the *pro se* petitioner does not know what the essential elements of a claim are. *Brown v. State*, 135 Idaho 676, 679, 23 P.3d 138, 141 (2001).

In *Charboneau*, the court determined that I.C. § 19-852 is no longer applicable to a post-conviction proceeding, and that “for the purposes of I.C. § 19-4904, the trial court should determine if the petitioner is able to afford counsel and whether this is a situation in which counsel should be appointed to assist the petitioner.” *Charboneau*, 140 Idaho at 793, 102 P.3d at 1112. If the petitioner alleges facts “to raise **the possibility** of a valid claim, the district court should appoint counsel to give the petitioner an opportunity to properly allege the necessary supporting facts.” *Id.* (emphasis added). Most recently, in *Swader v. State*, 143 Idaho 651, 152 P.3d 12 (2007), the Idaho Supreme Court clarified its “possibility of a valid claim” language from *Charboneau*. The *Swader* Court stated:

[T]he trial court should appoint counsel if the petition alleged facts showing the possibility of a valid claim **such that a reasonable person with adequate means would be willing to retain counsel to conduct a further investigation into the claim.** The investigation by counsel may not produce evidence sufficient to survive a motion to dismiss. But, the decision to appoint counsel and the decision on the merits of the petition if counsel is appointed are controlled by two different standards.

Id. 143 Idaho at 655, 152 P.3d at 16 (emphasis added).

In his petition Mr. Judd has raised several issues with regard to the ineffective assistance of counsel that he received in his underlying criminal action. See *Strickland v. Washington*, 466 U.S. 668 (1984) *State v. Hayes*, 138 Idaho 761, 69 P.3d 181 (Ct. App. 2003). Among his claims, he argued that his attorney failed to file an appeal and failed to file a Rule 35 motion after telling him he would do so. One of those basic elements defined by the Sixth Amendment is the right to the effective assistance of counsel. "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defense." U.S. CONST. amend IV. There is a two-pronged test to determine whether an attorney rendered ineffective assistance of counsel in violation of the Sixth Amendment. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Aragon v. State*, 114 Idaho 758, 760 P.2d 1174, 1176 (1988). Thus, to prevail on a claim of ineffective assistance of counsel a petitioner must show that his trial counsel's performance was deficient and that he suffered some prejudice (i.e., a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different") as a result of the deficient performance. *Strickland*, 466 U.S. at 694.

Here, if Mr. Judd was told by his counsel he would file a Rule 35 motion, and his counsel did not, then he was clearly denied right to counsel and was prejudiced by this because he did not file a motion himself and the district court could have reduced his sentence if a motion had been filed. See *id.* Likewise, counsel's failure to file an appeal also presents a potential valid claim. In *Roe v. Flores-Ortega*, 528 U.S. 470 (2000), the United States Supreme Court held that:

counsel has a constitutionally imposed duty to consult with the defendant about an appeal when there is reason to think either (1) that a rational

defendant would want to appeal (for example, because there are nonfrivolous grounds for appeal), or (2) that this particular defendant reasonably demonstrated to counsel that he was interested in appealing.

Id. at 480. Therefore, at the very least, Mr. Judd presented potential viable claims related to his counsel's ineffective assistance by failing to file a Rule 35 motion and failing to file a Notice of Appeal.

2. Mr. Judd Is Not Required To Show The Possibility Of A Valid Argument For Equitable Tolling

The only basis for the State's argument that any error in this case was harmless is that Mr. Judd's petition was untimely filed. (Respondent's Brief, pp.8-10) This argument misunderstands the distinction between the possibility of a valid "claim," which is raised in a petition for post-conviction relief and may entitle a defendant to the requested relief, and an argument for equitable tolling of the statute of limitations, which is an exception to the State's an affirmative defense that a petition is untimely. See *Chico-Rodriguez v. State*, 141 Idaho 579, 114 P.3d 137 (Ct. App. 2005); *Sayas v. State*, 139 Idaho 957, 88 P.3d 776 (Ct. App. 2003). Mr. Judd contends that to overcome harmless error, he must only show the possibility of a valid claim.

Both *Charboneau* and *Swader* require only that a defendant raise the possibility of a valid claim in order to have counsel appointed, all the while cautioning the district court to review the post-conviction petition liberally, recognizing the physical, education, and mental limitations a *pro se* petitioner might encounter. *Charboneau*, 140 Idaho at 793-94, 102 P.3d at 1112-13; *Swader*, 143 Idaho at 653-55, 152 P.3d at 14-16. See also *Brown v. State*, 134 Idaho 676, 23 P.3d (2001). Thus, the case law only requires that a *pro se* petitioner raise the possibility of a valid claim in order for counsel to be

appointed, not that he include all of the elements of a valid claim, including the applicable exceptions to the statute of limitations for a post-conviction action. Furthermore, requiring that a potentially mentally incompetent petitioner, or a petitioner without access to legal materials, understand that equitable tolling is an exception to an untimely post-conviction petition, when the district court has never addressed equitable tolling, renders these prior holdings and the rationale behind them illusory considering the limitations faced by *pro se* petitioners.

Therefore, because Mr. Judd raised the possibility of a valid claim as discussed above in section I(C)(1) *supra*, any error in this case was not harmless, and he should be entitled to the appointment of counsel.

3. If Mr. Judd Is Required To Show The Possibility Of A Valid Argument For Equitable Tolling He Has Met This Burden

In the instant case, the district court found that Mr. Judd's Petition was untimely, therefore it lacked jurisdiction to hear the petition. (Augmentation: Order dated July 2, 2008.) Idaho Code § 19-4902 provides: "An application [for Post-Conviction relief] may be filed at any time within one (1) year from the expiration from the time for appeal or from the determination of an appeal or from the determination from a proceeding following an appeal, whichever is later." *Id.* Mr. Judd concedes that his Petition was not filed within the timelines proscribed in § 19-4902; however, had counsel been appointed to represent Mr. Judd with his post-conviction action, counsel could have produced sufficient evidence to toll the statute of limitations due to Mr. Judd's incapacities.

In Idaho, equitable tolling of the statute of limitations for the filing of a petition for post conviction relief has been recognized where the defendant has been deprived of

access to the courts, including: “(1) where the petitioner was incarcerated in an out-of-state facility on an in-state conviction without legal representation or access to Idaho legal materials; (2) and where mental disease and/or psychotropic medication renders a petitioner incompetent and prevents petitioner from earlier pursuing challenges to his convictions.” *Sayas v. State*, 139 Idaho 957, 960, 88 P.3d 776, 780 (Ct. App. 2003).

Here, in his Response to the Notice to Dismiss, Mr. Judd explained that he “had spent his [e]ntire history in [resource] classes and special education classes.” (Augmentation: Response to Notice to Dismiss.)¹ This raises a potential issue of whether Mr. Judd’s time to file his petition would have been tolled because his mental disabilities prevented him from pursuing his post-conviction petition. Mr. Judd also explained that he did not know of his counsel’s failures until he met with a contract attorney in 2007. (Augmentation: Response to Notice to Dismiss.) Although, it is not clear from this statement, if Mr. Judd was deprived of access to the courts, at the very least, his mental abilities might have foreclosed Mr. Judd from raising his post-conviction claims until he met with a contract attorney who assisted him. Therefore, these statements raise the possibility of a valid argument that Mr. Judd’s time to file his post-conviction petition should have been tolled.

Mr. Judd asserts that this district court erred in failing to appoint counsel to assist him in his post conviction action; therefore, the denial of his motion for appointment of counsel was not harmless and his case should be remanded to the district court with

¹ In the Respondent’s Brief, the State asserts that the Response to Notice to Dismiss, filed July 2, 2008, has not been made part of the record on appeal; however, an Order Augmenting this order into the record was issued by the Idaho Supreme Court on October 14, 2008. (See Respondent’s Brief, p.2, n.1.)

instructions that counsel be appointed to guide him through the complex post-conviction proceedings.

CONCLUSION

Mr. Judd respectfully requests that this Court vacate the Order dismissing his post-conviction petition and remand his case to the district court for further consideration of his Motion for Appointment of Counsel prior to dismissing his petition.

DATED this 25th day of February, 2009.

A handwritten signature in black ink, appearing to read 'Heather M. Carlson', is written over a horizontal line.

HEATHER M. CARLSON
Deputy State Appellate Public Defender


CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 25th day of February, 2009, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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